Sri Ganeson a/l Angamuthu v Anglo-Eastern Plantations (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–301–11 OF 2015
SU GEOK YIAM J
31 JANUARY 2018

Labour Law — Industrial Court ('IC') — Decision — Employer demoted its employee and slashed his salary by 48.3% and removed many other benefits on his being found guilty of five charges of misconduct — Trade union ('union') of which employee was member lodged trade dispute against employer with Industrial Relations Department — Union sought reinstatement of employee to his former job without reduction in salary or loss of allowances/benefits — Minister referred trade dispute to IC for adjudication under s 26(2) of the Industrial Relations Act 1967 ('the IRA') — IC dismissed union's case after ruling employee was guilty of misconduct charges and punishment was with just cause or excuse — Whether IC committed jurisdictional error in treating case as one of wrongful dismissal under s 20(3) of the IRA — Whether IC erred in law in not considering that employer had no contractual, statutory or common law right to impose the punishment — Whether double punishment of demotion and salary reduction was mala fide, without just cause or excuse and an unfair labour practice — Whether IC's award unsustainable and had to be quashed

Four years after he commenced employment as an estate manager with the first respondent ('R1'), the applicant was found guilty of committing five charges of misconduct. As punishment, the applicant was demoted two posts down to the position of assistant estate manager, his salary was reduced from the RM6,215 he was earning per month to only RM3,000 per month, his children's educational allowance was taken away, he was told to vacate the estate bungalow he was staying in, his company car was taken away and he was given a motorcycle to use instead. Aggrieved by the punishment, the Union of Estate Administrators West Malaysia ('the union'), of which the applicant was a member, lodged a complaint about the matter with the Director-General of Industrial Relations ('the DG') as a trade dispute. Unable to resolve the dispute himself, the DG referred the matter to the Human Resources Minister, who, pursuant to s 26(2) of the Industrial Relations Act 1967 ('the IRA') referred the trade dispute to the Industrial Court (the second respondent) for adjudication. Before the Industrial Court ('the IC'), the union sought the applicant's reinstatement to his former position without loss of wages, allowances and benefits that were due to him under his contract of employment. The union pleaded that the applicant's demotion plus salary reduction was a double punishment that R1 had no right to impose; that the punishment was mala

fide, contrary to natural justice and good conscience and constituted an unfair labour practice. After a trial, the IC dismissed the union's case, ruling that R1 had proven the misconduct charges against the applicant and that the punishment imposed on him was with just cause or excuse. The applicant obtained leave to file the instant judicial review application in which he sought to quash the IC's award and obtain an order of mandamus directing the IC to determine the appropriate reliefs he was entitled to. Inter alia, the applicant contended that: (a) the IC had committed a jurisdictional error in treating the Ministerial reference as a wrongful dismissal case under s 20(3) of the IRA instead of as a trade dispute under s 26(2); and (b) the IC's finding that he was guilty of the charges of misconduct was illegal and/or irrational, as was the finding that the punishment imposed on him was with just cause or excuse.

Held, quashing the IC's award, declaring that the applicant's demotion was without just cause or excuse and directing the IC to assess the compensation payable to the applicant resulting from his unlawful demotion and reduction of salary:

(1) Although the reference by the Minister to the IC was made under s 26(2) of the IRA arising out of a trade dispute between the union and R1, the IC did not adjudicate the matter as such but as a Ministerial reference under s 20(3) which arose when a workman complained that he had been dismissed without just cause or excuse. The IC failed to consider whether R1 had a contractual, statutory or common law right to demote the applicant with a 48.3% reduction in his salary and, if the answer to that was in the negative, to consider whether the applicant ought to be reinstated to his former position, and if it was not suitable to do so, to consider the amount of compensation which ought to be paid to him to settle the trade dispute between the union and R1 (see paras 53, 57 & 62).

(2) In disregarding the union's pleaded case and in treating it as a wrongful dismissal case simpliciter, the IC had committed an error of law, namely, a jurisdictional error. This occurred due to the IC's failure to apply the trite principle of law that it was duty-bound to decide the case before it based on, and within the confines of, the pleadings of the parties (see paras 66–67).

(3) The double punishment of demotion and reduction in salary meted out to the applicant was not only without just cause or excuse but it also constituted an unfair labour practice. On the evidence and the law, R1 failed to establish that it had any contractual, statutory or common law right to impose such punishment. The punishment of demotion was not provided for in the applicant's contract of employment or in any other

disciplinary procedure of R1 which was applicable to the applicant. Accordingly, the IC's award was unsustainable and had to be quashed (see paras 131, 147 & 151–150).

(4) The IC's finding that the applicant was guilty of the charges of misconduct that were preferred against him was not illegal, perverse or irrational as it had taken into consideration all relevant matters and evidence before arriving at its finding. Sufficient evidence was adduced by R1's four witnesses and by the applicant's own admissions to show that he was guilty of those charges (see paras 115–116).

[Bahasa Malaysia summary

Empat tahun selepas memulakan pekerjaan sebagai pengurus estet dengan responden pertama ('R1'), pemohon didapati bersalah melakukan lima dakwaan salah laku. Sebagai hukuman, pemohon telah diturunkan dua jawatan ke jawatan pembantu pengurus estet, gajinya dikurangkan daripada RM6,215 yang dia peroleh sebulan kepada hanya RM3,000 sebulan, elaun pendidikan anak-anaknya telah diambil, dia diberitahu untuk mengosongkan banglo estet yang didudukinya, kereta syarikatnya telah diambil dan sebaliknya dia diberi motosikal untuk digunakan. Terkilan dengan hukuman, Persatuan Pentadbir-Pentadbir Ladang Malaysia Barat ('Persatuan'), di mana pemohon adalah seorang ahli, membuat aduan mengenai perkara tersebut dengan Ketua Pengarah Perhubungan Perusahaan ('DG') sebagai suatu pertikaian perdagangan. Apabila tidak dapat menyelesaikan pertikaian tersebut dengan sendiri, DG merujuk perkara tersebut kepada Menteri Sumber Manusia, yang, menurut s 26(2) Akta Perhubungan Perusahaan 1967 ('Akta') merujuk pertikaian perdagangan ke Mahkamah Perusahaan (responden kedua) untuk adjudikasi. Di hadapan Mahkamah Perusahaan ('MP'), Persatuan memohon pengembalian semula pemohon ke kedudukan terdahulu tanpa kehilangan gaji, elaun dan manfaat yang patut kepadanya di bawah kontrak kerja. Persatuan memplid bahawa penurunan pangkat pemohon ditambah pengurangan gaji adalah hukuman berganda yang R1 tidak mempunyai hak untuk mengenakan; bahawa hukuman tersebut adalah mala fide, bertentangan dengan keadilan semula jadi dan kemurnian dan merupakan amalan buruh yang tidak adil. Selepas perbicaraan, MP menolak kes Persatuan, memutuskan bahawa R1 telah membuktikan dakwaan salah laku terhadap pemohon dan bahawa hukuman yang dikenakan ke atasnya adalah dengan sebab atau alasan yang adil. Pemohon mendapatkan kebenaran untuk memfailkan permohonan semakan kehakiman ini di mana dia memohon untuk membatalkan award MP dan mendapatkan perintah mandamus mengarahkan MP untuk menentukan relif yang sewajarnya dia berhak. Antara lain, pemohon berpendapat bahawa: (a) MP telah melakukan kesalahan bidang kuasa dalam menganggap rujukan Menteri sebagai kes pemecatan yang salah di bawah s 20(3) Akta bukannya sebagai pertikaian perdagangan di bawah s 26(2); dan (b) penemuan MP bahawa dia bersalah atas dakwaan salah laku adalah menyalahi undang-undang

dan/atau tidak rasional, sebagaimana dapatan yang dikenakan hukuman atasnya dengan sebab atau alasan yang adil.

Diputuskan, membatalkan award MP, mengisytiharkan bahawa penurunan pangkat pemohon adalah tanpa sebab atau alasan adil dan mengarahkan MP untuk menilai pampasan yang perlu dibayar kepada pemohon akibat daripada penurunan pangkat yang menyalahi undang-undang dan pengurangan gaji:

(1) Walaupun rujukan oleh Menteri kepada MP dibuat di bawah s 26(2) Akta yang timbul daripada pertikaian perdagangan antara Persatuan dan R1, MP tidak mengadili perkara tersebut sebagai sedemikian tetapi sebagai rujukan Menteri di bawah s 20(3) yang timbul apabila seorang pekerja mengadu bahawa dia telah diberhentikan tanpa sebab atau alasan adil. MP gagal untuk mempertimbangkan sama ada R1 mempunyai hak kontrak, statutori atau undang-undang umum untuk menurunkan pangkat pemohon dengan pengurangan gaji sebanyak 48.3% dan, jika jawapannya adalah negatif, untuk mempertimbangkan sama ada pemohon perlu dikembalikan semula kepada jawatan terdahulu, dan jika tidak sesuai untuk berbuat demikian, untuk mempertimbangkan jumlah pampasan yang sepatutnya dibayar kepadanya untuk menyelesaikan pertikaian perdagangan antara Persatuan dan R1 (lihat perenggan 53, 57 & 62).

(2) Dengan tidak menghiraukan kes yang diplid oleh Persatuan dan dalam menganggapnya sebagai kes pemecatan salah ambil mudah, MP telah melakukan kesalahan undang-undang, iaitu, suatu kesalahan bidang kuasa. Ini berlaku kerana kegagalan MP untuk mengguna prinsip undang-undang mantap bahawa ia adalah terikat untuk memutuskan kes tersebut berdasarkan, dan dalam batas-batas, pliding pihak-pihak (lihat perenggan 66–67).

(3) Hukuman berganda penurunan pangkat dan pengurangan gaji yang dikenakan kepada pemohon bukan sahaja tanpa sebab atau alasan adil tetapi juga merupakan amalan buruh tidak adil. Mengenai keterangan dan undang-undang, R1 gagal membuktikan bahawa ia mempunyai hak kontrak, statutori atau undang-undang umum untuk mengenakan hukuman sedemikian. Hukuman penurunan pangkat tidak diperuntukkan dalam kontrak pekerjaan pemohon atau dalam mana-mana prosedur tatatertib R1 lain yang terpakai kepada pemohon. Oleh itu, award MP tidak boleh dikekalkan dan harus dibatalkan (lihat perenggan 131, 147 & 151–150).

(4) Penemuan MP bahawa pemohon bersalah atas dakwaan salah laku yang dikenakan terhadapnya tidak menyalahi undang-undang, jahat atau tidak rasional kerana telah mengambil kira semua perkara dan keterangan yang relevan sebelum sampai pada dapatannya. Keterangan yang mencukupi telah dikemukakan oleh empat saksi R1 dan oleh

pengakuan pemohon sendiri untuk menunjukkan bahawa dia bersalah atas dakwaan tersebut (lihat perenggan 115–116).]

Notes

For cases on decision, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1810–1811.

Cases referred to

Abdul Razak Ismail v Mix-Target (M) Sdn. Bhd. [2009] 1 ILR 346, IC (folld)
Abdul Razak bin Ismail v Mix-target (M) Sdn Bhd [2009] ILJU 21; [2009] 1 ILR 346, IC (refd)
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (refd)
Harianto Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2011] 3 ILR 241; [2011] 5 CLJ 188; [2010] 1 LNS 1236, HC (refd)
Kejuruteraan Samudra Timur Sdn Bhd v Seli Mandoh & Anor [2004] 1 CLJ 393, HC (refd)
Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537, FC (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba [1998] 2 MLJ 372, CA (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)
Syarikat Permodalan Kebangsaan Bhd v Mohamed Johari Abdul Rahman [2004] 2 ILR 803, IC (refd)
Tan Ngiap Kit v Affin Bank Berhad [2016] 1 ILJ 160; [2015] 1 ILR 8, IC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771; [1996] 1 MLJ 261, CA (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule
Employment Act 1955 s 14
Industrial Relations Act 1967 ss 20, 20(3), 26(2), 30, 30(1), (3), (5), (6), Parts VI, VII
Rules of Court 2012 O 53, O 53 r 3(2), O 59 r 7(4)

VK Raj (Gerald John Pereira with him) (G Pereira & Assoc) for the applicant.

Teh Hong Jet (Tan Kim Siong & Teh Hong Jet) for the first respondent.

Su Geok Yiam J:

THE APPLICANT'S APPLICATION FOR JUDICIAL REVIEW, ENCL (1)

[1] This is an application dated 25 November 2015 filed on the same date by Sri Ganeson a/l Angamuthu, the applicant, through Messrs G Pereira & Assoc ('the applicant's solicitors'), pursuant to O 53 of the Rules of Court 2012 ('the RC 2012') for leave to commence a judicial review proceeding against the respondents. Together with his application, the applicant also filed his statement under O 53 r 3(2) of the RC 2012 dated 23 November 2015 ('O 53 statement'), encl (2), and his affidavit-in-support affirmed by himself, on 16 November 2015, encl (3).

[2] Anglo-Eastern Plantations (M) Sdn Bhd, the applicant's former employer, is the first respondent.

[3] 'Mahkamah Perusahaan Malaysia' in Malay or 'Industrial Court Malaysia' in English is the second respondent ('the Industrial Court').

[4] If leave is granted, the applicant seeks an order of certiorari to bring to the Kuala Lumpur High Court and quashed, Award No 1065 of 2015 of the Industrial Court dated 27 August 2015 ('the award'), in the Industrial Court Case No 15(6)/3–567 of 2008 ('the IC case') (see prayer (i) of encl (1)).

[5] In encl (1), the applicant also seeks the following reliefs in prayer (ii) and the renumbered prayers (iii), (iv) and (v), which state as follows:

> (ii) Kebenaran diberikan kepada Pemohon untuk memohon suatu Perintah Mandamus yang diarahkan kepada Pendaftar Mahkamah Perusahaan menghendaki beliau menetapkan Kes Mahkamah Perusahaan No. 15(6)/3-567/08 untuk perbicaraan dihadapan Pengerusi yang lain untuk menentukan remedy yang sewajarnya;
>
> (iii) Secara alternative, suatu keputusan yang memihak kepada Pemohon bahawa penurunan jawatan dan gaji beliau adalah tidak adil dan munasabah;
>
> (iv) Sekiranya perlu, perintah-perintah dan arahan-arahan selanjutnya diberikan; dan
>
> (v) Kos dalam kausa.

[6] On 10 February 2016, Hanipah bt Farikullah J granted leave to the applicant to commence this judicial review proceeding against the respondents.

CAUSE PAPERS FOR SUBSTANTIVE APPLICATION FOR JUDICIAL REVIEW

[7] The parties then filed the following additional cause papers for the substantive application for judicial review:

(a) the applicant's notice of hearing of application for judicial review dated 19 February 2016 and filed on the same date, encl (5);

(b) the first respondent's affidavit in reply affirmed on 14 March 2016 by Mr Chua Hwa Phuay, the Group General Manager of the first respondent, and filed through Messrs Tan Kim Siong & Teh Hong Jet ('the first respondent's solicitors') on 16 March 2016, encl (6);

(c) the applicant's affidavit in reply affirmed on 18 May 2016 by Sri Ganeson a/l Angamuthu, the the applicant himself, and filed on 19 May 2016, encl (7);

(d) the first respondent's affidavit in reply No 2 affirmed on 9 June 2016, by Mr Chua Hwa Phuay, the Group General Manager of the first respondent, and filed through the first respondent's solicitors on 10 June 2016, encl (8);

(e) the applicant's additional affidavit affirmed on 24 June 2015 by Thirugnanam Rasa, an advocate and solicitor from the applicant's solicitors, and filed on 27 June 2018, encl (9);

(f) the applicant's additional affidavit affirmed on 8 September 2016 by Thirugnanam Rasa, an advocate and solicitor from the applicant's solicitors, and filed on 9 September 2016, encl (14);

(g) the applicant's written submissions dated 10 October 2016 and filed on 11 October 2016, encl (22);

(h) the applicant's bundle of authorities (not e-filed);

(i) the first respondent's written submissions dated 14 November 2016 and filed on 15 November 2016, encl (25);

(j) the first respondent's bundle of authorities (not e-filed);

(k) common core bundle ('CCB') filed on 29 November 2016 by the applicant's solicitors in accordance with the direction of Puan Ti Pei Si, the learned senior assistant registrar ('SAR') of this court (Kuala Lumpur High Court NCVC 11), encl (28);

(l) the applicant's additional written submissions dated 16 June 2017 and filed on 19 June 2017, encl (29); and

(m) the applicant's additional bundle of authorities (not e-filed);

DECISION OF THIS COURT DATED 7 JULY 2017 ON SUBSTANTIVE JUDICIAL REVIEW APPLICATION

[8] On 7 July 2017, I heard the parties' oral submissions for the applicant's substantive judicial review application in encl (1). In the course of their oral submissions, Mr VK Raj ('Mr Raj'), who acted as counsel for the applicant's solicitors, and Mr Teh Hong Jet ('Mr Teh'), learned counsel for the first respondent, referred to their, respective, written submissions and bundles of authorities. Mr Raj also referred to his additional written submissions and additional bundle of authorities, which he had put in and served on the first respondent's solicitors, in accordance with the direction of this court.

[9] Having considered their, respective, submissions and authorities relied upon by them and the applicant's additional written submissions and additional authorities relied upon by the applicant, I granted order in terms of prayers (i). I made no order for prayer (ii). I granted a declaration for the renumbered prayer (iii) that the demotion of the workman was without just cause or excuse. I granted an order of mandamus for the renumbered prayer (iv) that the assessment for the compensation payable to the applicant for his unlawful demotion and reduction of salary be heard by another Chairman of the Industrial Court. I ordered the first respondent to pay costs of RM5,000 to the applicant for the renumbered prayer (v) that costs be paid to the applicant by the first respondent for encl (1).

[10] The renumbering of the prayers was due to there being two existing prayers (ii) in encl (1). Hence, I granted the applicant's oral application to amend encl (1), by renumbering the second existing prayer (ii) as prayer (iii) and the existing prayers (iii) and (iv), respectively, as prayers (iv) and (v), respectively.

[11] I further ordered the SAR to issue the allocatur certificate in accordance with O 59 r 7(4) of the RC 2012. I, finally, ordered that the allocatur fee must be paid before the fair copy of the order made that day can be filed in the court.

[12] Being dissatisfied with my decision dated 7 July 2017, the first respondent filed an appeal against it to the Court of Appeal on 24 July 2017.

REASONS FOR DECISION OF THIS COURT DATED 7 JULY 2017

[13] Below are the reasons for the decision of this court.

[14] I agreed with the submissions of Mr Raj, learned counsel for the applicant's solicitors, that the substantive judicial review application has merits and ought to be allowed.

[15] On costs for encl (1), Ms SP Devi, who mentioned on behalf of Mr Raj, learned counsel for the applicant's solicitors, prayed for costs of RM5,000 whilst Mr Teh, learned counsel for the first respondent, proposed the same amount as costs.

[16] I awarded a sum of RM5,000 as costs for encl (1) as I was of the view that a sum of RM5,000 was a reasonable amount of costs to be ordered against the first respondent. This is because I took into consideration the work, which was done by the applicant's solicitors in filing the cause papers and submissions and in perusing the first respondent's cause papers and submissions. I also took into consideration the oral submissions of Mr Raj, who acted as counsel for the applicant's solicitors, and the oral submissions of Mr Tee, learned counsel for the first respondent on 7 July 2017.

BACKGROUND FACTS

[17] Below are the background facts, which led to the applicant filing encl (1) against the respondents.

[18] On 2 April 2003, the applicant commenced his employment with the first respondent, as the Estate Manager of Manyvest Estate ('MVE') in Kemaman, Terengganu vide a contract of employment dated 28 February 2003 ('contract of employment').

[19] On 29 September 2003, the applicant was informed that he was confirmed in his position as estate manager with effect from 2 October 2003 (see letter of confirmation dated 29 September 2003, exh 'CO2', the first respondent's statement in reply in the IC case).

[20] By a letter dated 8 September 2004, the applicant was informed by the first respondent that his basic salary would be increased to RM5,775 with effect from 1 July 2004. He was also informed that the Board of Directors of the first respondent had also approved the payment to him of one month's bonus for the year 2003 (see exh 'CO3', first respondent's statement in reply in the IC case).

[21] As an estate manager, the applicant also received benefits and service allowance, which are required to be paid under various collective agreements between the first respondent and the union.

[22] However, with effect from 9 October 2007, the applicant was demoted from the position of Estate Manager of MVE to the position of Assistant Estate Manager of MVE with a reduction of 48.3% in his salary ('demotion and reduction of salary') by the first respondent. This had occured after the

applicant was found guilty of five charges of misconduct in a domestic inquiry ('DI').

[23] The applicant had attended the DI, which was held on 21 September 2007 and 24 September 2007, to defend himself and he pleaded not guilty to the five charges of misconduct. The DI was chaired by Mr Chan Voon Hian @ Chen Voon Shian ('Mr Chan'), a freelance HR practitioner, who was appointed by the first respondent to undertake that task ('the panel of the DI'). The prosecuting officer in the DI was Mr Loong Wah Koon ('Mr Loong'), a freelance HR practitioner, who was appointed by the first respondent to undertake that task ('PO'). The secretary of the DI was Ms Helena Seet, the first respondent's accountant ('the secretary').

[24] In the DI, the PO called five witnesses in support of the first respondent's case for the five charges of misconduct. The first witness is Mr Hooi Chew Heng ('Mr Hooi'), as PW1. He was attached to Anglo Eastern Plantations in Indonesia as the Plantation Adviser ('PA') to the Cenderung Estates, Terengganu, Malaysia, which comprise three estates, vis MVE, Putera North Estate and Putera South Estate. The second witness is Ms Helena Seet, the first respondent's Accountant, as PW2. The third witness is Encik Hamzah bin Omar, the Assistant Manager of MVE, as PW3. The fourth witness is Encik Mohammad Zamri bin Mat Ali, the Senior Chief Clerk of MVE, as PW4. The fifth witness is Encik Saifol Bahari bin Shaffie, a field conductor of MVE, as PW5.

[25] In the DI, the applicant cross-examined all the five witnesses of the first respondent during the first respondent's case. After the conclusion of the first respondent's case, the applicant called himself as his sole witness to give oral evidence in his defence to the five charges preferred against him. The applicant tendered eleven documents, which were marked as exhs 'D1' to 'D11', to support his defences to the five charges. The applicant was cross-examined by the PO

[26] Subsequently, the applicant put in his written submission (see Appendix B to the report of the panel of the DI). The panel of the DI found the applicant guilty of charge 1, guilty of charges 2(a) and (b), not guilty of charges 2(c) and (d), guilty of charges 3(a) and (b) together with (c), guilty of charge 4 and guilty of charge 5. His findings and recommendations are contained in the report of the panel of the DI.

[27] Even though the first respondent was of the view that the misconduct of the applicant was serious and warranted his dismissal the first respondent decided to punish the applicant with a demotion and reduction of salary in order to give him a second chance to continue working in MVE instead of

dismissing him. The first respondent did this because it was of the view that the punishment by way of a demotion and reduction of salary was a lesser punishment compared to a dismissal in which event, the applicant would no longer have the opportunity to continue working in MVE.

[28] Being aggrieved with his demotion and reduction of salary by the first respondent, the 'Persatuan Pentadbir-Pentadbir Ladang Malaysia Barat' in Malay or the 'Union of Estate Administrators West Malaysia' in English ('the union'), of which the applicant is a member, referred the dispute ('the trade dispute'), on behalf of the applicant, to the Director General ('DG') of the Industrial Relations Department ('IRD') of the Ministry of Human Resources ('HR') for resolution.

[29] Due to the failure of the DG of the IRD to resolve the trade dispute between the union and the first respondent, a report of the trade dispute was put up by the DG of the IRD ('the DG's report') and forwarded to the Right Honourable Minister of HR ('the Minister'). After having considered the DG's report and in exercise of his powers under s 26(2) of the Industrial Relations Act 1967 ('the IRA 1967 1967'), the Minister referred the trade dispute to the Industrial Court vide a letter dated 30 June 2008 ('the Ministerial reference').

[30] In the IC case, the applicant was represented by Messrs G Pereira & Assoc, the applicant's solicitors for encl (1) whilst the first respondent was represented by Messrs Tan Kim Siong & Teh Hong Jet, the first respondent's solicitors for encl (1).

[31] In his statement of case, the applicant averred that the panel of the DI was wrong in its findings for failing to consider that the applicant faced several impediments in attaining a high performance in his job as the Estate Manager of MVE. The applicant averred that the DI was mala fide and that his demotion was without just cause or reason and/or was done mala fide. Alternatively, the applicant averred that his demotion was contrary to the principles of natural justice and good conscience and constitutes an unfair labour practice, which ought to be struck down by the Industrial Court. The applicant prayed for an order of reinstatement to his former position without loss of wages, arrears, service allowances and benefits payable under his contract of employment and under collective agreements and that the same be paid to him within one month of the date of the award of the Industrial Court.

[32] In its statement in reply, the first respondent denied that the applicant's demotion was wrong and in breach of good industrial relations practice. The first respondent prayed that the applicant's claim be dismissed.

[33] On 27 August 2015, the panel of three members of the Industrial

Court, vis the chairman, a representative from the employer's panel and a representative from the employee's panel, found that the first respondent has proven, on the balance of probabilities, that the applicant was guilty of the following charges out of the five charges preferred against him in the notice of inquiry:

(a) charge 1 for failing or been negligent in discharging his duties as the Estate Manager of MVE;

(b) charges 2(a) and (b) for poor performance in the area of field management for the poor field conditions of 98A, 99A and 95A for year of planting 2006 even though he had grossly overspent the weeding allocation for 2006, and for carrying out lalang spraying during the rainy season of November and December instead of doing it during the dry months;

(c) charges 3(a), (b) and (c), for maintaining inaccurate records of the readings in the vehicle and gen-set logbooks;

(d) charge 4 for unauthorised approval of payment of a RM50 monthly allowance to Mohd Zamri bin Mat Ali, a Senior Chief Clerk of MVE; and

(e) charge 5 for unauthorised increment of the monthly motorcycle allowance of Saifol Bahari Shaffie, a trainee field conductor, from RM100 to RM150.

[34] In the award, the Industrial Court dismissed the union's case. It decided that the applicant's demotion by the first respondent was with just cause or excuse based on its findings of guilt against the applicant for the above five charges. The Industrial Court did not consider whether the first respondent had the contractual or statutory or common law right to impose the punishment of demotion and reduction in salary on the applicant instead of the punishment of a dismissal.

[35] Being dissatisfied with the award, the applicant filed encl (1) in the Kuala Lumpur High Court to seek the reliefs mentioned earlier in this judgment.

GROUNDS FOR SUBSTANTIVE JUDICIAL REVIEW APPLICATION

[36] The grounds relied upon by the applicant for the substantive judicial review application are set out in para 3 (a) to (d) of the applicant's O 53 statement, encl (2). I have summarised the grounds as follows:

(a) the award suffers from *Wednesbury* unreasonableness as the Industrial Court adjudicated the Ministerial reference under s 20 of the IRA 1967 instead of

under s 26(2) of the IRA 1967, which requires the Industrial Court to consider whether the punishment of demotion and reduction in salary imposed on the applicant was proportionate to the misconduct, if any, committed by him;

(b) in doing so, the Industrial Court committed an error of law in exercising the jurisdiction conferred on the Industrial Court under s 20 of the IRA 1967 for the wrongful dismissal of a workman instead of the jurisdiction conferred on the Industrial Court under s 26(2) of the IRA 1967 for a trade dispute between a Union and the employer of a workman, who is a union member;

(c) in doing so, the Industrial Court failed to direct its mind to the trade dispute, which concerned the double punishment of demotion and reduction in salary, imposed on the applicant, which the applicant contends was not only not proportionate to the misconduct, if any, committed by him, but was also wrongful and the applicant seeks to be reinstated to his former position;

(d) alternatively, the Industrial Court exceeded its jurisdiction and/or failed to take relevant matters into consideration when it decided that the applicant was guilty of the five charges of misconduct thereby rendering its decision illegal and/or irrational based on the following reasons:

(i) in regard to charge 1, there was no evidence of any circular which mandated that the bags of fertiliser must be kept inside the fertiliser store;

(ii) in regard to charge 2, the Industrial Court did not take into account the following relevant matters:

(1) that there was a discrepancy between COW2's evidence and COW1's evidence on whether lalang spraying can be carried out during the months of November and December;

(2) COW2's evidence that lalang spraying can be carried out during the months of November and December depending on the situation (which corroborates the applicant's evidence) but the Industrial Court only took into account COW1's evidence that lalang spraying cannot be carried out during the months of November and December; and

(3) judicial notice that the decision whether to carry out lalang spraying during the months of November and December was the decision of the applicant as the Estate Manager of MVE and not COW1, who was only the PA to MVE;

(iii) in regard to charge 3(a), the Industrial Court did not take into account the following relevant matters:

(1) that the charge is defective because the person who was responsible for looking after the logbook of MVE's Suzuki Jeep ('the company vehicle') was COW3 and not the applicant;

(2) that the applicant did not check the accuracy of the entries of the mileage readings in the logbook of the company vehicle as the entries were made by COW3;

(3) yet the applicant, who was not the person responsible for looking after the logbook of the company vehicle, was charged for not ensuring that the entries of the mileage readings in the logbook of the company vehicle were accurate;

(4) that there was evidence from COW1, COW3 and COW4 that it was COW3's responsibility to look after the logbook of the company vehicle but the Industrial Court committed an error of law when the Industrial Court decided that it was the applicant, who was responsible for looking after the logbook of the company vehicle; and

(5) the applicant's evidence that the reason for the inaccurate mileages in the logbook of the company vehicle was due to its faulty speedometer and not because the mileages shown on its speedometer were inaccurately recorded by COW3;

(iv) in regard to charge 3(b), the Industrial Court did not take into consideration the following matters:

(1) COW1's admission during cross-examination that he did not advise the applicant on the standard operating procedures ('SOP') for the two gen-sets, vis that it is not possible for the two gen-sets to operate simultaneously due to a changeover switch; and

(2) that there was no evidence that the first respondent was prejudiced due to the wrong recording in the logbooks of two gen-sets that both the gen-sets were operating at the same time since this was not possible;

(v) in regard to charges 4 and 5, the Industrial Court failed to take into consideration the following relevant evidence:

(1) the applicant's evidence, which was corroborated by his witness, Mr Sim (CLW1), the former managing director ('MD') of the first respondent, that the applicant as the Estate Manager of MVE can approve any revenue expenditure below RM10,000 and that revenue expenditure includes expenditure for payment of salaries and allowances; and

(2) the evidence of the first respondent's accountant (Ms Helena Seet) during the DI that as MVE's Estate Manager the applicant can approve any payment not exceeding RM5,000.

ISSUES FOR DETERMINATION OF THIS COURT

[37] Based on the grounds relied upon by the applicant for the substantive judicial review application, there are three issues for the determination of this court. The three issues are as follows:

(a) whether the Industrial Court committed a jurisdictional error when it treated the Ministerial reference as a dismissal dispute between a workman and an employer under s 20 of the IRA Act 1967 instead of as a trade dispute between a trade union and the employer of a workman, who is a union member, under s 26(2) of the IRA Act 1967?

(b) whether the decision of the Industrial Court that the applicant was guilty of charge 1; charges 2(a) and (b); charges 3 (a), (b) and (c); charge 4; and charge 5 as stated in the notice of inquiry was illegal and/or irrational? and

(c) if the answer to issue (2) is 'No', whether the decision of the Industrial Court that the applicant's demotion and reduction of salary were with just cause or excuse was illegal and/or irrational?

THE APPLICANT'S SUBMISSIONS BEFORE THIS COURT

[38] Before this court, Mr VK Raj, learned counsel for the applicant, submitted that encl (1) has merits and ought to be allowed based on the following reasons:

(a) the Industrial Court erroneously exercised its jurisdiction under s 20 of the IRA 1967 instead of under s 26 (2) of the IRA 1967 as the dispute is not a dismissal dispute concerning the wrongful dismissal of a workman but a trade dispute concerning the wrongful demotion of a workman;

(b) in doing so, the Industrial Court committed an error of law when it did not consider whether the first respondent as the employer has the contractual or statutory or common law right to impose the punishment of demotion on the applicant;

(c) in doing so, the Industrial Court also committed an error of law when it did not consider whether the punishment of demotion and reduction in salary was a double punishment and if so, whether it is an unfair labour practice and was done mala fide;

(d) the Industrial Court misapplied the principle of law on wrongful dismissal laid down in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 ('*Wong Yuen Hock*'s case') to the applicant's pleaded case, which was for wrongful demotion;

(e) in doing so, the Industrial Court has breached the principle of pleadings that parties are bound by their pleadings;

(f) the Industrial Court's findings of guilt in the award for the five charges were arrived at without taking into consideration relevant matters and evidence; and

(g) hence, the award is an irrational award and ought to be quashed by an order of certiorari and the first respondent be ordered to pay compensation to the applicant for his wrongful demotion and reduction in salary.

THE FIRST RESPONDENT'S SUBMISSIONS

[39] Mr Teh, learned counsel for the first respondent, submitted that encl (1) has no merits and ought to be dismissed as the second respondent did not commit any error of law based on the following reasons:

(a) a judicial review is not an appeal and, hence, this court ought not to treat this proceeding as an appeal;

(b) this court only needs to determine whether the award suffers from illegality, irrationality and/or impropriety (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 ('R Rama Chandran'), *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372, and *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317);

(c) the Industrial Court decided the IC case under s 20 of the IRA 1967;

(d) once a dismissal dispute is referred to the Industrial Court by the Minister under s 20 of the IRA 1967, the Industrial Court is clothed with jurisdiction to hear the dispute and to hand down an Award based on the merits of the dispute (see *Wong Yuen Hock*'s case, and *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537);

(e) based on the authorities, the function and role of the Industrial Court in a s 20 reference is to firstly determine whether there was a dismissal and if there was a dismissal, then the next question is whether the dismissal was with just cause or excuse;

(f) in determining these two questions, the Industrial Court is duty bound to investigate the facts, analyse the facts, make a finding on the facts and lastly apply the law to the facts;

(g) s 30(5) of the IRA 1967 provides that in discharging this duty, the Industrial Court shall act in accordance with equity and good conscience and substantial merits of the case without regards to technicalities and legal form;

(h) based on the evidence adduced by the first respondent's four witnesses in the trial before the Industrial Court and the evidence of Ms Helena Seet in the DI, the first respondent has proven on the balance of probabilities that it has just cause and excuse to demote the applicant to the position of assistant manager;

(i) there is no evidence to show that the demotion of the applicant was tainted with mala fide; and

(j) the award is not illegal or irrational as the Industrial Court took into consideration all the relevant and material facts and evidence in arriving at its award.

THE APPLICANT'S ADDITIONAL SUBMISSIONS

[40] In compliance with the direction of the court, Mr Raj, learned counsel for the applicant, put in additional submissions to address the issue whether an employer has an implied right or power to demote a workman in the absence of a demotion clause in the workman's contract of employment or in the disciplinary procedure of the employer, which is applicable to the workman.

[41] Based on his research, he submitted that the issue must be decided in the negative (see *Syarikat Permodalan Kebangsaan Bhd v Mohamed Johari Abdul Rahman* [2004] 2 ILR 803; *Tan Ngiap Kit v Affin Bank Berhad* [2016] 1 ILJ 160; [2015] 1 ILR 8; *Abdul Razak bin Ismail v Mix-target (M) Sdn Bhd* [2009] ILJU 21; [2009] 1 ILR 346 and KP Chakravarti's *Domestic Enquiry and Punishment* (3rd Ed).

FINDINGS OF THIS COURT AND REASONS FOR FINDINGS

[42] Below are the findings of this court on the three issues and the reasons for the findings.

The law on judicial review

[43] The law on judicial review is trite. The power of the High Court to review an inferior tribunal's decision is a vital and important power. It is by way of a judicial review and not by way of a rehearing of the applicant's claim as a judicial review of the award is not an appeal against the award.

[44] A substantive judicial review application is an application to impugn the award of the second respondent on the grounds of illegality, irrationality and/or impropriety (see *R Rama Chandran*).

[45] The power enjoyed by the High Court to grant orders of certiorari and mandamus in judicial review proceedings is the prerogative jurisdiction enjoyed by the United Kingdom courts in the dispensation of justice under the English common law and equity, which we in Malaysia have inherited and which has been expressly included in the additional powers of the High Court in para 1 of Schedule read together with s 25(2) of the Courts of Judicature Act 1964. The paragraph states as follows:

> 25 Powers of the High Court
>
> (a) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.
>
> ...
>
> SCHEDULE
>
> (Section 25(2))
>
> ADDITIONAL POWERS OF HIGH COURT
>
> 1 Prerogative writs
>
> Power to issue to any person of authority directions, *orders* or writs, including writs *of* the nature of habeas corpus, mandamus, prohibition, quo warranto and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. (Emphasis added.)

[46] The power of the High Court and the extent of its power to review the decisions of inferior tribunals, which include the award of the second respondent in the IC case, are very clearly explained in *R Rama Chandran* by the eminent judge, Edgar Joseph Jr FCJ (as he then was).

[47] In that case, at p 187, His Lordship stated as follows:

> But Lord Diplock's other grounds of impugning a decision susceptible to Judicial

Review make it abundantly clear that such a decision is flawed on the grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.

In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationally, and (iii) procedural impropriety. This is how he put it:

> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked on Judicial Review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

Lord Diplock's first ground for challenge, namely 'illegality', involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers.

...

Lord Diplock's second ground for challenge, namely, 'irrationality' recognises a different route whereby the substance of a decision may be reviewed by the courts. By this means, Lord Diplock made it clear that despite being legal, that is to say within the powers conferred, a decision may nevertheless be struck down, for being contrary to substantive principles. In the words of Lord Diplock, 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no

A sensible person who had applied his mind to the question to be decided could have arrived at it'

...

Lord Diplock's third ground of judicial review — procedural impropriety which B involves reviewing a decision for process — requires no comment, having regard to the topic I am now addressing.

[48] At p 223, His Lordship further stated as follows:

C It follows, therefore, that while our O 53 can only prescribe the *procedure and practice* to be followed by parties when applying for Judicial Review, the source of *power* enjoyed by our courts to grant relief in Judicial Review proceedings is the prerogative jurisdiction inherited from the United Kingdom courts and, most importantly, para 1 of the Schedule read with s 25 of the Courts of Judicature Act 1964. The proviso to s 25(2), and more particularly, the Rules of the High Court D 1980, do not — and indeed cannot — narrow down or diminish or curtail the scope of the *powers* conferred upon our courts in Judicial Review proceedings.

With respect, therefore, it is difficult to see how the provisions of the proviso to s 25(2) can constitute an impediment to our reliance on the provisions of para 1 of Schedule in the manner we had in this case. E

So much for the proviso to s 25(2).

Secondly, the dissenting judgment has made the point that it is not open to this court to find that the Employee has been dismissed from service without just cause or excuse, as this was a question of fact for the Industrial Court by Virtue of the F Industrial Relations Act 1967.

This point appears to be supported by what Lord Brightman said in *Puhlhofer and another v Hillingdon London Borough Council* [1986] AC 484 at p 518D–E:

> G Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of the fact to the public body to whom Parliament has entrusted the decision-making power ...

However, like most principles, there are important *exceptions*, which tend to blur the H conceptual distinction between errors of law and fact. Two of these *exceptions* which are relevant to the present case must be mentioned; they are:

(1) Reliance upon an erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* I [1985] AC 374. Indeed, in *R v Hillingdon LBC, ex p Puhllhofer* (ibid), Lord Brightman made this clear by adding to the passage in his judgment cited above, 'save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely'.

(2) Where there is no evidence to support a conclusion, there is necessarily an

> error of law in the decision arrived at (see *Edwards v Bairstow* [1956] AC 14; *Din (Taj) v Wandsworth LBC* at p 664H, per Lord Wilberforce; *R v Hillingdon London Borough Council, ex p Islam* [1983] 1 AC 688 at p 708D, per Lord Wilberforce and at p 717 G, per Lord Lowry).

But, as *Wade and Forsyth Administrative Law* (7th Ed, 1994) have correctly pointed out (at p 312):

> No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see *Allinson v General Medical Council* [1894] 1 QB 750 at pp 760, 763; *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329 at p 345), or where, in other words, no tribunal could reasonably reach that conclusion on that evidence (see *R v Roberts* [1908] 1 KB 407 at p 423). This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires.

> As I have said, our conclusion that the employee had been dismissed from service without just cause or excuse was arrived at as a result of reviewing the Award not only for *process* but also for *substance* and, in my view, came within the range of the two exceptions aforesaid. (Emphasis added.)

[49] The general rule is that the High Court will not strike down a decision of an inferior tribunal if there is no 'procedural impropriety'. However, it is clear from the landmark decision of *R Rama Chandran* that there are two exceptions to that general rule. These two exceptions are reliance upon an erroneous factual conclusion and where there is no evidence to support a conclusion. Where the inferior tribunal has committed an error based on the following grounds:

(a) 'illegality' which means that the inferior tribunal has not kept strictly within the perimeters of its power in making the decision;

(b) 'irrationality' which means that the decision of inferior tribunal is so outrageous in its defiance of logic or of accepted moral standards that no sensible person or tribunal, who had applied his or its mind to the question to be decided, could have arrived at it; and

(c) 'procedural impropriety' which means that the decision-making process of the inferior tribunal is unfair as there has been a breach of the basic rules of natural justice and/or the procedural rules which govern the power of the inferior tribunal;

the decision of the inferior tribunal can be removed to the High Court and quashed by an order of certiorari.

[50] Hence, it is trite law that the High Court has jurisdiction to judicially review and scrutinise the decision of an inferior tribunal not only for process

but also for substance if the decision of an inferior tribunal is illegal and/or irrational.

Issue (1): Whether the Industrial Court committed a jurisdictional error when it treated the Ministerial reference as a dismissal dispute between a workman and an employer under s 20 of the IRA 1967 instead of as a trade dispute between a trade union and the employer of a workman, who is a union member, under s 26(2) of the IRA 1967?

[51] I decided issue (1) in the affirmative. Below are my reasons.

[52] The Ministerial reference states as follows:

AKTA PERHUBUNGAN PERUSAHAAN 1967

Keputusan Menteri Di bawah Seksyen 26(2)

BAHAWASANYA selepas menimbangkan laporan Ketua Pengarah Perhubungan Perusahaan Malaysia atas *pertikaian di antara Anglo-Eastern Plantations (M) Sdn. Bhd., Level 8, Wisma Equity, No. 150, Jalan Ampang, 50450 Kuala Lumpur Dengan Persatuan Pentadbir-Pentadbir Ladang Malaysia Barat*, first Floor, 275, Jalan Haruan 1, Oakland Industrial Park, 70200 Seremban Negeri Sembilan *Mengenai hukuman Turun Pangkat Dan Gaji Encik Sri Ganeson a/l M. Angamuthu* saya berpuashati bahawa adalah espedient bagi pertikaian ini dirujuk ke Mahkamah Perusahaan dan *pada menjalankan kuasa-kuasa yang diberi oleh Seksyen 26(2) Akta Perhubungan Perusahaan 1967, saya dengan ini merujukkan pertikaian ini ke Mahkamah Perusahaan*.

...(tandatangan)...

(DATUK DR. S. SUBRAMANIAM, P.J.N., K.M.N., P.J.K.)

Menteri Sumber Manusia

Malaysia

Bertarikh 30 haribulan Jun 2008.

(Emphasis added.)

[53] However, despite clearly stating at the outset of the award that the Ministerial reference was a reference made by the Minister under s 26(2) of the IRA 1967 arising out of a trade dispute between the union and the first respondent, the Industrial Court did not adjudicate the Ministerial reference as a trade dispute under s 26(2) of the IRA 1967. This is because the Industrial Court did not consider whether the first respondent has the contractual or statutory or common law right to demote the applicant with a 48.3% reduction in his salary and if the answer is in the negative, to consider whether the applicant ought to be reinstated to his former position by virtue of his wrongful demotion and reduction of salary by the first respondent and if it is

not suitable to do so, to consider the amount of compensation, which ought to be paid to the applicant in order to settle the trade dispute between the union and the first respondent.

[54] Section 26(2) of the IRA 1967, which comes under Part VII of the IRA 1967, states as follows:

> 26 Reference of trade disputes to the Court
>
> (1) Where a trade dispute exists or is apprehended, the Minister may, if that dispute is not otherwise resolved, refer the dispute to the Court on the joint request in writing to the Minister by the trade union of workmen which is a party to the dispute and the employer who is a party to the dispute or a trade union of employers which is a party to the dispute.
>
> (2) The Minister may of his own motion or upon receiving the notification of the Director General under subsection 18(5) refer any trade dispute to the Court if he is satisfied that it is expedient so to do:
>
> Provided that in the case of a trade dispute in any Government service or in the service of any statutory authority, reference shall not be made except with the consent of the Yang di-Pertuan Agong or State Authority as the case may require.

[55] The power of the Industrial Court to make an award in relation to a Ministerial reference under s 26(2) of the IRA 1967 and a Ministerial reference under s 20(3) of the IRA 1967 is contained in s 30 of the IRA 1967. Section 30 of the IRA 1967 states as follows:

> *30 Awards*
>
> (1) *The Court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under subsection 20(3), to make an award (including an interim award) relating to all or any of the issues.*
>
> (2) Where the Court is not unanimous on any question or matter to be determined, a decision shall be taken by a majority of members and, if there is no majority decision, by the President or Chairman.
>
> (3) *The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under subsection 20(3).*
>
> (4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.
>
> (5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

(5a) In making its award, the Court may take into consideration any agreement or code relating to employment practices between organizations representative of employers and workmen respectively where such agreement or code has been approved by the Minister.

(6) *In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under subsection 20(3).*

(6a) Notwithstanding subsection (6), the Court in making an award in relation to a reference to it under subsection 20(3) shall take into consideration the factors specified in the Second Schedule.

(7) An award may specify the period during which it shall continue in force, and maybe retrospective to such date as is specified in the award:

Provided that the retrospective date of the award may not, except in the case of a decision of the Court under section 33 or an order of the Court under paragraph 56(2)(c) or an award of the Court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, be earlier than six months from the date on which the dispute was referred to the Court.

(8) The award of the Court shall be signed by the President or the Chairman of any Division or in the event of the President or the Chairman for any reason being unable to sign the award by the remaining members.

(9) The Court may rectify in any award any clerical error or mistake arising from any accidental slip or omission. (Emphasis added).

[56] It is clear from ss 26(2) and 20(3) of the IRA 1967 read together with s 30(1), (3) and (6) of the IRA 1967 that there are two types of Ministerial references under the IRA 1967.

[57] However, in the IC case the Industrial Court adjudicated the Ministerial reference as a reference made by the Minister under s 20(3) of the IRA 1967 arising from the dismissal of a workman, as if it was about the complaint by a workman that his dismissal was wrongful, vis without just cause or effect.

[58] This error of law can be seen towards the end of the award, where the Industrial Court held as follows:

Having regard therefore, to the totality of the evidence before this court and being enjoined to act according to equity and good conscience on the substantial merits of the case without regard to technicalities and legal form, the court unanimously finds that the findings by the panel of inquiry were correct and the company has discharged its burden of proof in respect of the 5 charges leveled against the claimant.

[59] I noted that the approach adopted by the Industrial Court in the IC case is no different from the one to be adopted for cases involving wrongful dismissals under s 20 of the Act. Hence, I am of the respectful view that it is apparent that the Industrial Court had misapplied the principle of law laid down by the Federal Court in *Wong Yuen Hock*'s case to the facts in the IC case without appreciating that the Ministerial reference was made by the Minister in exercise of his discretionary power in s 26(2) of the IRA 1967 and not in exercise of his discretionary power in s 20(3) of the IRA 1967.

[60] In that case, at p 762, the Federal Court held as follows:

> ... the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal ...

[61] Section 20 of the IRA 1967, which comes under Part VI of the IRA 1967, states as follows:

> 20 Representations on dismissals
>
> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (1a) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
>
> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.
>
> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) *Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.*
>
> (4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.
>
> (5) This section shall not apply to the dismissal of a workman in circumstances arising out of a contravention of section 59 where proceedings have been commenced before a court in respect of an offence under subsection 59(1); where, while proceedings are pending under this section, proceedings arising out of the

same dismissal are commenced before a court in respect of an offence under subsection 59(1), the proceedings under this section shall not be proceeded with further.

(6) In any proceedings under subsection (2) —

(a) an employer may —

(i) represent himself or be represented by his duly authorized employee

(ii) where he is a member of a trade union of employers, be represented by any officer or employee of such trade union of employers; or

(iii) notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, be represented by any official of an organization of employers registered in Malaysia (not being a trade union of employers); and

(b) a workman may —

(i) represent himself;

(ii) where he is a member of a trade union of workmen, be represented by any officer or employee of such trade union of workmen; or

(iii) notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, be represented by any official of an organization of workmen registered in Malaysia (not being a trade union of workmen).

(7) Save as provided in subsection (6), a workman or employer shall not be represented by an advocate, adviser, consultant or by any other person whatsoever.

(8) For the purpose of carrying out his functions under this section the Director General —

(a) shall have the power to direct either party to furnish to him, within such period as may be specified in that direction, such information as he may consider necessary or relevant; and

(b) may, if he deems it necessary or expedient, direct any person engaged in or connected directly or indirectly with the dismissals to attend a conference to be presided over by the Director General or such person as he may appoint at such time and place as may be specified in the direction.

(9) Where a workman who has made a representation under subsection (1) attends none of the conferences under paragraph (8)(b) without any reasonable excuse, the representation shall be deemed to have been withdrawn. (Emphasis added).

[62] Based on the undisputed facts of the IC case, the applicant was not dismissed by the first respondent based on findings of guilt for five charges of misconduct. The applicant was demoted from his position as an estate manager with a salary of RM6,215 a month to a much lower position as an assistant manager with a salary of only RM3,000. This was a choice of punishment made by the respondent on the ground that although the applicant's

misconduct warranted the punishment of a dismissal, the first respondent chose to punish the applicant by demoting him two positions downwards to give him another chance to continue working in MVE.

[63] However, this punishment caused the applicant not only severe financial hardship but also severe physical hardship. This is because he suffered a drastic financial loss of RM3,000 in his salary, which is a reduction of 48.3% in his salary and the loss of his children's educational allowance of RM92. In addition, he had to move out of his bungalow and share a house with his subordinates. On top of all those losses or deprivations at the hands of the first respondent, the applicant had to travel to work on a motorcycle provided by the first respondent as his company vehicle was taken back by the first respondent.

[64] As stated earlier in this judgment, in the IC case, the union had sought for a reinstatement of the applicant to his former post, specifically, on the ground that the applicant's demotion was mala fide and without just cause or excuse (see paras 9–10 of the union's statement of case, on behalf of the applicant, at p 3 of the applicant's affidavit in support, encl (3), of encl (1)).

[65] In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, the Federal Court decided that the principle of law that parties are bound by their pleadings apply not only to the civil courts but also to the Industrial Court. At p 642, the Federal Court held as follows:

> However, as rightly pointed out by learned counsel for the respondent s 30(5) of the Act cannot be used to override or circumvent the basic rules of pleading. The Industrial Court, like the civil courts must confine itself to the four corners of the pleading. ...
>
> ... Thus, the Industrial Court's duty, to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form under s 30(5), does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principle Act.

[66] Reverting back to the instant case, I am of the respectful view that in disregarding the union's pleaded case and in treating the union's pleaded case as a wrongful dismissal case simpliciter the Industrial Court committed an error of law, vis a jurisdictional error.

[67] This has occurred due to the failure of the Industrial Court to apply the trite principle of law that the Industrial Court is duty bound to decide the case before it based on and within the confines of the pleadings of the parties.

Issue (2): Whether the decision of the Industrial Court that the applicant was guilty of charge 1; charges 2 (a) and (b); charges 3 (a), (b) and (c); charge 4; and charge 5

as stated in the notice of inquiry was illegal and/or irrational?

[68] I decided issue (2) in the negative. Below are my reasons.

[69] The letter of appointment sets out the applicant's responsibilities as an estate manager under five categories. Three of them, which are relevant to the five charges preferred against the applicant in the notice of inquiry, are as follows:

RESPONSIBILITIES

° You will be responsible for ensuring that the overall operations of the estates are carried out in accordance with the accepted practice in industry.

° You shall faithfully and diligently perform such duties and exercise such powers consistent with the office to which you are appointed as from time to time assigned to or vested in you and shall comply with the directives of the Company.

° ...

° ...

° You are responsible to the Managing Director for all aspects of your function. You are also required to carry out such other duties and job functions in which you may he instructed fromt time to time by the Company or persons acting on behalf of the Company.

[70] The five charges preferred against the applicant in the notice of the DI state as follows:

(1) That you have failed and/or have been negligent in discharging your duties as Estate Manager, Manyvest Estate as follows:

(a) You did not monitor and control the receipt of the fertilizers supplied to the estate in the month (sic) of March and April, 2007, resulting in excessive build-up of fertilizer stock which had to be stored outside the store thus exposing it to the risk of rain; and

(b) You did not inform the Head Office in Kuala Lumpur to delay or stop the supplying of fertilizers; while at the same time did not mobilize your existing field workers or harvesters to carry out manuring application on the oil palm trees in the estate.

(2) That you have performed poorly in the area of field management in the following aspects:

(a) The field conditions for year of planting (sic) 98A, 99A and 95A were in poor state, even though weeding expenditure for 2006 was grossly overspent by you;

(b) In order to use up the fund in the budget, you carried out lalang spraying during the rainy season of November and December, instead

of spraying the week killer during the dry months, which is the normal agricultural practice;

(c) You approved payment of pruning work, which was not completely carried out in the field 92A, 93A, 94A, 95A, 96A, 98A and 99A; and

(d) You arbitrarily fixed the pruning rate at RM7/ha, without taking into consideration the variation in stand per hectare of the various fields.

(3) That you have maintained inaccurate recording of the vehicle and gen-set log books as detailed below:

(a) When the Planting Advisor, Mr Hooi Chew Heng inspected the Suzuki Jeep on the 28th April, 2007, he found that the reading shown on the speedometer was 31,951 km, which was totally different from the figure recorded in the vehicle log book maintained by you, which was 23,509 km;

(b) Three sets of conflicting figures, *viz* the one in the log book, the one in Planting Advisor's questionnaire and the one in your reply to the PA's questionnaire as per attached (marked 'A') were presented to the Planting Advisor, Mr Hooi Chew Heng regarding the gen-set operation, during his visit to the estate on 3/2/2007 and upon questiong by the Planting Advisor, you were unable to explain the discrepancy; and

(c) You reported to the Planting Advisor that both the 40kva and 30kva gen-sets were in use at the same time, when you know very well that only one gen-set could be operated at any one time.

(4) That you have in March, 2007 approved payment of an allowance of RM 50 per month (backdated to February, 2007) to Mohd Zamri bin Mat Ali, Senior Chief Clerk of Manyvest Estate for carrying out duties relating to repatriation and medical check-up of foreign workers, without seeking prior approval for such payment from the Company's Head Office in Medan, Indonesia;

(5) That you have, upon yourself, taken the decision to increase the motorcycle allowance of one trainee, Saifol Bahari Shaffie from the current RM 100 per month to RM 150 per month (during his probation period) effect (sic) from May, 2006 without seeking prior approval from the Company's Head Office in Medan, Indonesia.

[71] The trial of the IC case commenced on 31 May 2010 and concluded on 19 April 2012. The first respondent called four witnesess. They are Mr Hooi Chiew Heng ('Mr Hooi') (COW1); En Hamzah bin Omar ('En Hamzah') (COW2); En Saifol Bahari bin Shaffie ('En Saifol') (COW3); and Mr Chan (COW4).

[72] Mr Hooi (COW1), who is based in Sumatra Utara, Indonesia, was the Regional Manager of the Anglo-Eastern Plantations in Indonesia and the PA

for the Chenderung Estates in Terengganu, at all material times. He testified on 31 May 2010 vide a witness statement and orally.

[73] As the PA, he was responsible for visiting MVE, which was one of the three Chenderung Estates in Terengganu, to conduct checks on the management of MVE by the applicant. Upon his return to Indonesia after each of his visits he would prepare a report of his visit and send it to the applicant for action to be taken by the applicant.

[74] En Hamzah (COW2) was the Acting Manager of MVE, after the demotion of the applicant. He testified on 31 May 2010 vide a witness statement and orally.

[75] En Saifol (COW3) was a trainee field conductor of MVE, at the material time. He testified on 31 May 2010 vide a witness statement and orally.

[76] Mr Chan (COW4) was the panel of the DI, who had found the applicant guilty of charge 1, guilty of charges 2(a) and (b), not guilty of charges 2(c) and (d), guilty of charges 3(a) and (b) together with (c), guilty of charge 4 and guilty of charge 5 as stated in the notice of inquiry misconduct. He testified in the trial of the IC case on 31 May 2010 vide a witness statement and orally.

[77] The applicant called two witnesses, namely, Mr Sim Hock Soon ('Mr Sim'), as CLW1; and the applicant himself, as CLW2 (see the evidence of the applicant in the notes of evidence at p 232 onwards for 21 June 2011 and at p 250 onwards for 13 January 2012, CCB, encl (28)). At the material time, Mr Sim was the first respondent's managing director and he was based in Medan, Indonesia. Both Mr Sim and the applicant testified vide a witness statement each and orally.

[78] I noted that in the applicant's written submissions dated 27 February 2014 (see CCB, encl (28)), which were put in by Messrs G Pereira & Assoc after the conclusion of the trial of the IC case by the Industrial Court, Mr Gerald John Pereira, learned counsel for the applicant, had contended that the applicant was not guilty of the five charges based on the following reasons:

(a) the PA, who visited MVE between 5 August 2006 and 7 August 2006, sent his report (see exh 'CLB2', pp 1–12) to the applicant but nowhere in the conclusion of his report did the PA chastise or reprimand the applicant (see exh 'CLB2', p 12);

(b) out of the blue on 10 September 2007, the applicant was falsely accused of having committed acts of misconduct as stated in the notice of

inquiry and suspended from work for 14 days commencing 11 September 2007 (see COB — pp 13–15); A

(c) the applicant's suspension was completely unwarranted since the issues raised in the five charges stated in the notice of inquiry did not involve any criminal conduct of any nature or relate to any wilful insubordination on the applicant's part; B

(d) the applicant was not at fault because he had faced an acute labour shortage at MVE from late 2006 onwards and he had desperately tried to obtain additional workers through the first respondent's Head Office in Medan, Sumatra, Indonesia but he was not very successfull (see applicant's three executive summary reports for the three months of June, July and August 2007, COB — pp 155–159); C

(e) the first respondent had preferred the five charges against the applicant without any substantiation or proof; D

(f) in regard to charge 1 on excess inventory of fertiliser in the store of MVE, the applicant's defence is that he has no control in relation to the arrival of the fertiliser at the store; that there was no evidence tendered by the first respondent to show any theft, damage and misuse of the fertiliser supplied to MVE; and that the excess inventory of fertiliser was stored within the vicinity of the store under protection from the elements with overhead cover and tarpaulin; E

(g) in regard to charge 2 on poor field management, the applicant's defence is that the maintenance of the three fields, vis 98A, 99A and 95A, could not be carried out for want of sufficient labour and his evidence was supported by the evidence of Encik Hamzah, the Acting Manager of MVE (COW2) during cross-examination; F

(h) the suggestion by the PA that lalang spraying could not be undertaken during the rainy season in November and December makes no sense at all and was preposterous as the PA and the acting manager admitted during cross-examination that lalang spraying could be undertaken during the rainy season provided there is enough sunlight for about four to six hours at a time; G

(i) the complaint of overpruning in some 96 areas appears to be strange; the so called 'overspending' for weeding was within the established parameter of estate operations, where an excess of 5%–10% expenditure is tolerated; and the payment of RM7 per hectare for pruning is within the applicant's authority and within the norm of other estates of the same group nearby MVE; H I

(j) in regard to charge 3 on inaccurate recording of vehicle and gen-set logbooks, the applicant's defence is that he has to rely on his cohorts to carry out various functions within MVE; he ought not to be faulted for

their omissions in recording accurately the activities that they are supposed to do; upon the PA raising with him the query of the inaccurate recording of vehicle and gen-set logbooks, the applicant had investigated the query and got the inaccuracies rectified; and that it is not a crime to rectify mistakes;

(k) in regard to charge 4 on discrepancies in the recording of the mileages of company vehicles, the applicant's defence is that the speedometer and tachometer were faulty and that hence, there was a possibility that the accurate recording of the mileages of company vehicles was compromised;

(l) in regard to charge 5 on unauthorised payment of allowances, the applicant's defence is that it was not a crime; that he had exercised his discretion within the first respondent's authorisation limit; and that the first respondent had, subsequently, through its managing director approved an increase in the motorcycle allowance on 2 May 2006 (see CLB3, p 3);

(m) there was no evidence to suggest that the applicant had benefitted in any manner or enriched himself at the expense of the first respondent; and

(n) even though the applicant did not commit any criminal misconduct, the PO in the DI, submitted at the conclusion of the DI that the prosecution has proven beyond reasonable doubt that the applicant is guilty of the charges.

[79] However, I have perused the notes of proceedings, which contain the notes of evidence of the first respondent's four witnesses and the applicant's two witnesses. Having done so, I found that based on the evidence adduced before the Industrial Court, the Industrial Court did not commit any error of law when it decided that the applicant was guilty of charge 1; charges 2(a) and (b); charges 3(a), (b) and (c); charge 4; and charge 5 as stated in the notice of inquiry. I found this to be especially so as the evidence of COW1 was very comprehensive in that it had covered all the five charges. His evidence in his examination-in-chief, which is contained in his witness statement and oral testimony, is substantiated by documentary evidence, which includes records kept at MVE including records of rainfall and the daily muster-chit, and also photographs taken by him during his visits to MVE three or four times a year. I also found that COW1's evidence was corroborated by the evidence of COW2 and COW3.

[80] I shall now deal with each of the five charges as stated in the notice of inquiry. Charge 1 relates to the failure and/or negligence of the applicant in discharging his duties as the Estate Manager of MVE due to the excess inventory of fertiliser in the store. The applicant was charged because: (a) he

did not monitor and control the receipt of the fertiliser supplied to MVE in March and April 2007, resulting in the excessive build-up of fertiliser stock for MVE, which in turn led to the excess being stored outside the store, thereby exposing it to the risk of rain; (b) he did not inform the head office to delay or stop the supply and delivery of fertiliser to MVE; and (c) he did not mobilise his field workers to carry out the manuring application on the oil palm trees.

[81] In regard to charge 1, COW1 testified in his examination-in-chief and in his cross-examination that at the material time, his duties and responsibilities as the PA for the three Chenderung Estates including MVE, were as follows:

i. to ensure the estate adhere to company's policies;

ii. to ensure that the production cost of the estates are well under control and within budget;

iii. to ensure the estates achieve and maintain high agricultural standards;

iv. to report any discrepancy found on the estates to the Managing Director based in Medan, Indonesia;

v. to advise Estates Managers on estates management practice;

vi. to ensure that the estates achieve high production (fresh fuit buch of oil palm) with low cost.'

(See his answer to Q3 of his witness statement).

[82] When he was cross-examined by Mr Gerald John Pereira, the applicant's learned counsel, on his functions as the PA for MVE, COW1 gave the same answer by referring to his answer to Q3 of his witness statement.

[83] COW1 testified in his examination-in-chief that during his visit to MVE on 27 and 28 April 2007, there was an excessive build-up of fertiliser stock worth a total of RM508,250.36 which was stored outside the store thus exposing it to the risk of rain, which would affect the condition of the fertiliser. COW1 said that by March 2007, 126.3mt of Kie serite fertiliser and 762.29mt of Hi-Kay Plus fertiliser were supposed to be applied but no fertiliser was actually applied to the fields (see COW1's evidence at p 99 of the CCB, at Tab 11, encl (28)). COW1 also said that there is a programme for manuring or application of fertiliser for MVE but it was not carried out. COW1 further said that it is the responsibility of the applicant to ensure that manuring or application of fertiliser for MVE is carried out.

[84] COW1's evidence is corroborated by photographs taken by him, which show the Hi Kay fertiliser placed outside the fertiliser store during his visit to MVE on 27 April 2007 and 28 April 2007 (see p 100 of the CCB, at Tab 11, encl (28)).

[85] When COW1 was referred to the photographs taken by him during his visit to MVE on 27 April 2007 and 28 April 2007, which show the fertiliser outside the fertiliser store, he testified as follows:

Q: Refer to pages 95–110 of COB-2 — confirm that these were the photographs taken by you during your visit at that time?

A: Yes.

Q: Do you have the original pictures with you?

A: No.

(Mr. Teh says he will try to get the original photographs).

Q: Refer to page 96 — what do these photos show?

A: This shows the fertilizer Hi Kay outside the fertilizer store.

Q: During your visit on 27.4.2007 and 28.4.2007?

A: Yes.

[86] COW1 also said that, as the estate manager, the applicant should stop the supply of the fertiliser to MVE if he is not going to use it but he did not inform the Kuala Lumpur Office of the first respondent to do that.

[87] The applicant explained to COW1 that the fertiliser was piled up in April 2007 as there was no application of fertiliser due to shortage of workers. COW1 was not satisfied with the applicant's explanation as the applicant could have offered to the harvesters or other workers in MVE, the work of manuring in the afternoon after they have completed their normal duties from 7am–2pm Hence, COW1 was of the view that the applicant has been negligent in discharging his duties as the Estate Manager of MVE.

[88] In his evidence-in-chief, the applicant said that there was enough place to store the excess fertiliser in the store but during cross-examination, the applicant admitted that there were about 4,500 bags being stored outside the store. During cross-examination, the applicant also said that he only called the Kuala Lumpur office to stop the supply and delivery of fertiliser to MVE at the end of April 2007 after he was reprimanded by COW1.

[89] Based on the above evidence, the Industrial Court ruled that the applicant's credibility was questionable and the Industrial Court found the applicant guilty of charge 1.

[90] Charge 2 relates to the applicant's poor performance in field management by the applicant in pruning and weeding for three fields, vis 98A, 99A and 95A. The applicant was charged that he had performed poorly in field management because: (a) the field conditions for year of planting for three fields, vis 98A, 99A and 95A, were in poor state, even though the weeding expenditure for 2006 was grossly overspent by the applicant; and (b) in order to use up the fund budget, the applicant carried out lalang spraying during the rainy season, instead of during the dry season.

[91] In regard to charge 2, COW1 testified that the field condition was bad during his visit in February 2007 even though the applicant had overspent tremendously the fund for field maintenance. COW1 also testified that it is not advisable to carry out lalang spraying during the rainy season because it needs six hours of sunlight for the chemical to react and kill the lalang but the applicant had carried out the lalang spraying during the two rainy months of November and December.

[92] In his testimony, COW1 has relied on the daily rainfall records kept by MVE for the month of November 2006 and for the month of December 2006 (see p 100 of the notes of proceedings in CCB, Tab 11, encl (28)). These rainfall records show the dates and the different times, vis morning, afternoon and night, of the rainfall (see pp 111–127 of COB2, in particular, p 118 for the month of November and p 119 for the month of December).

[93] COW1 also said that it is not advisable to carry out lalang spraying during the monsoon period, which has a high rainfall. He explained that this is because the active ingredient in the chemicals, which are used for spraying the lalang, is glysophate, which requires about six hours after spraying to give a good kill of the lalang. With a high rainfall almost every day during the monsoon period, the first respondent will usually not spray lalang during this period of the year in order to avoid the risk of the sprayed chemicals being washed away by the rain (see p 102, CCB, encl (28)).

[94] When COW1 was referred to the daily rainfall record kept by MVE, he testified as follows:

> Q: Refer pages 111 to 127 of COB-2 and in particular pages 118 and 119 — what are these documents?

A: This is the daily rainfall record kept by the Estate for November 2006 (page 118) and December 2006 (page 119) which showed the dates and the different times for morning, afternoon and night.

Q: At pages 118 and 119, the last column 'EM' stands for?

A: Estate Manager, Mr. Ganeson.

[95] When COW1 was referred to the daily muster-chit, he explained as follows:

Q: Refer to pages 128 to 157 of COB-2 — what are these documents?

Q: This is the daily muster — chit — this records the work allocation for the day, the number of people for that work allocated to and also have the usage of tractors and vehicles which is also recorded there plus other information like previous day's rain and the fresh fruit bunch harvested the previous day.

Q: For which month?

Q: Pages 128–157 is for the month of November 2006.

Q: Refer to pages 158 to 186 of COB-2 — what are these documents?

Q: Yes these are the daily muster — chits from 1.12.2006 to 31.12.2006.

Q: From the record of daily muster — chits for November and December 2006, is there anywhere stated therein the records that lalang spraying was done during that time?

Q: If it is stated, it should be under the column 'Nature of Work'.

Q: From the records which are the dates lalang spraying was carried out?

Q: One on 14.11.2006 at page 141, 15.11.2006 at page 142, 21.11.2006 at page 148, 22.11.2006 at page 149, 23.11.2006 on page 150, 26.11.2006 on page 153, 27.11.2006 on page 154, 28.11.2006 on page 155, 29.11.2006 on page 156, 30.11.2006 on page 157. For December 2006 – 2nd December page 159, 3rd page 160, 7th page 164, 10th page 167, 14th page 171, 16th page 173.

Q: Is it advisable to carry out lalang spraying during this period?

Q: It is not advisable during the monsoon period with a high rainfall.

Q: Why?

Q: Because the chemicals which we used the active ingredient which is glysophate which requires about 6 hours after spraying to give a good kill. With a high rainfall almost every day, usually we don't take a risk to spray lalang during this period of the year.

...

Mr. Teh has no further question for examination-in-chief.

[96] Based on the above evidence, the Industrial Court found the applicant guilty of charges 2(a) and (b).

[97] Charge 3 relates to the inaccurate recording of the mileage on the speedometer of the first respondent's Suzuki Jeep ('the vehicle') and the hours of usage of the gen-sets in the logbooks. The applicant was charged that he maintained inaccurate recordings of the vehicle and gen-set logbooks because: (a) the reading on the speedometer of the vehicle was 31,951km but the recorded figure was 23,509km; (b) the applicant was unable to explain the discrepancy of the three sets of conflicting figures for the usage hours of the gen-set operation; and (c) his report that the 40kva and 30kva gen-sets were in use at the same time despite knowing that only one gen-set could be operated at any one time.

[98] In regard to charge 3(a), COW1 testified that when he inspected the speedometer of the vehicle at MVE on 28 April 2007, it showed 31,951km, which was totally different from the figure recorded in the vehicle's logbook, that is 23,509km on 27 April 2007. It was the applicant's duty and responsibility to record the figures shown on the vehicle's speedometer and to ensure that the mileage recorded was correct. However, he was told that the applicant had delegated his duty to one of his staff, namely, En Saifol ('COW3'), to record the mileage in the vehicle's log-book and that he ('the applicant') would check it.

[99] When COW1 queried the applicant on this discrepancy, the applicant did not reply. Subsequently, the applicant explained that the meter jumped due to meter fault. However, COW1 consulted a reputable Toyota Service Advisor from the Toyota workshop in Seremban, who told him that the meter would not jump. Furthermore, COW1 saw that the vehicle's speedometer clocked only 49km after he had visited all the fields in MVE

[100] The applicant agreed during cross-examination that the vehicle was used by him and that he was responsible for the accuracy and correctness of the recording in the logbook. He also admitted that he had signed and approved the contents of the logbook (see pp 115–118, COB1) and that those were the records for the months of March and April 2007.

[101] The applicant also agreed that he had delegated his duty to one of his staff, namely, En Saifol (COW3), to record the mileage in the vehicle book and he would check it but he did not check it to ascertain whether the mileage recorded by En Saifol (COW3) was correct.

[102] The applicant also agreed during cross-examination that it was not possible to travel 8,442km a day. The applicant also agreed during cross-examination that he had subsequently prepared a new set of records from

March 2007 to April 2007 (see pp 120–125, COB1) where the mileage recorded was different from that recorded on pp 115–119 in the logbook of the Suzuki Jeep.

[103] Based on the above evidence, the Industrial Court found the applicant guilty of charge 3(a).

[104] In regard to charge 3(b), COW1 testified that during his visit to MVE at the end of April 2007, he had inspected the gen-set records. Prior to his visit, the applicant as the estate manager had to fill up the planting advisor's questionnaire before his visit. COW1 found that there was a discrepancy in the records of the use of the two big gen-sets, vis 40kva and 30kva, in the logbook and the planting advisor's questionnaire.

[105] When COW1 questioned the applicant on the discrepancy, the applicant gave him another different figure verbally. COW1 said that it was not possible to run the two gen-sets together and simultaneously due to a changeover switch but the applicant had approved the two gen-sets to be run together at the same time, which was not possible. When COW1 questioned the applicant, the applicant could not give him a reply and the applicant finally admitted that he was wrong and that the two gen-sets could not run together.

[106] COW1 saw that the recording in the logbook is the same for almost the whole year and yet the applicant as the estate manager did not know why the two gen-sets were recorded as running together at night. COW1 took it to mean that there was no one in MVE, who went through the logbook for the two gen-sets and even if the person did, the person had signed it blindly, without knowing the reason. Based on the results of his investigation on the management and operations of MVE, COW1 was of the view that the applicant was not suitable to be the Estate Manager of MVE.

[107] In cross-examination, the applicant agreed that he had signed the logbooks of the company vehicle and the two gen-sets blindly.

[108] Based on the above evidence, the Industrial Court found the applicant guilty of charges 3(b) and (c).

[109] Charge 4 relates to the unauthorised payment of an allowance of RM50 per month (backdated to February 2007) to one Mohd Zamri bin Mat Ali ('Mohd Zamri'), the Senior Chief Clerk of MVE. The applicant was charged that he had approved the payment to Mohd Zamri for carrying out duties relating to repatriation and medical check-up of foreign workers, without seeking prior approval from the head office.

[110] In regard to charge 4, the applicant admitted during cross-examination that he must obtain the approval of the managing director before he could approve the payment of the allowance to Mohd Zamri. A

[111] Based on his admission, the Industrial Court found the applicant guilty of charge 4. B

[112] Charge 5 relates to the unauthorised increase in the motorcycle allowance of one trainee, En Saifol (COW3). The applicant was charged that in March 2007 he had on his own taken the decision to increase the motorcycle allowance of En Saifol (COW3) from RM100 to RM150 during his probation period, with effect from May 2006 without seeking prior approval from the Head Office. C

[113] In regard to charge 5, the applicant admitted during cross-examination that he must obtain the approval of the Head Office in Medan, Sumatra, Indonesia before he could increase the motorcycle allowance of the trainee, En Saifol (COW3). D

[114] Based on his admission, the Industrial Court found the applicant guilty of charge 5. E

[115] From the notes of proceedings of the trial of the IC case before the Industrial Court, I found that there was sufficient evidence adduced by the first respondent's four witnesses and the applicant's own admissions during cross-examination to prove them. Based on the reasons of the Industrial Court for its findings of guilt against the applicant in the award, I found that the Industrial Court has taken into consideration all the relevant matters and evidence before arriving at its findings. F

G

[116] Therefore, on issue (2), I was of the respectful view that the decision of the Industrial Court that the applicant was guilty of charge 1; charges 2(a) and (b); charges 3(a), (b) and (c); charge 4; and charge 5 as stated in the notice of inquiry was not illegal, perverse or irrational, as contended by Mr Raj, learned counsel for the applicant's solicitors. H

Issue (3): If the answer to issue (2) is 'No', whether the decision of the Industrial Court that the applicant's demotion and reduction of salary were with just cause or excuse was illegal and/or irrational?

I

[117] I decided issue (3) in the affirmative. Below are my reasons.

[118] The events, which led to the applicant's demotion and reduction of salary, are not in dispute.

[119] By a letter dated 11 January 2005 (see exh 'CO4', first respondent's statement in reply filed in the IC case), the first respondent informed the applicant, inter alia, that the fresh fruit bunch ('FFB') production for the year 2004 for MVE was 15,898 metric tons ('mt') and that this represented a shortfall of 22.6% below the budget ('the shortfall'). The applicant was also informed that the shortfall translated into a substantial nett loss of revenue of RM1,216,777m for the first respondent.

[120] By a memo dated 24 November 2005 (see exh 'CO5', first respondent's statement in reply filed in the IC case), the first respondent warned the applicant of his poor management as he was not fully in control of the estate operation. The applicant was also warned that this warning letter would also affect his year end increment and bonus.

[121] By a letter dated 22 May 2006 (see exh 'CO6', first respondent's statement in reply filed in the IC case), the first respondent informed the applicant that the first respondent has decided not to award him any bonus for the year 2005 in view of the poor performance of the estate in terms of crop, cost and field condition and 2006 due to his poor performance.

[122] By a letter dated 31 May 2007 (see exh 'CO7', first respondent's statement in reply filed in the IC case), the first respondent informed the applicant that the first respondent has decided not to award him any bonus for the year 2006 in view of his unsatisfactory performance.

[123] By a letter dated 20 August 2007 (see exh 'CO8', first respondent's statement in reply filed in the IC case), the first respondent informed the applicant that the first respondent has decided not to revise his salary for the year 2007 in view of his unsatisfactory performance.

[124] By a letter dated 10 September 2007 issued by Mr Steven Chew, the Finance and Administration Director of the first respondent (see exh 'CO9', first respondent's statement in reply, filed in the IC case) ('the notice of inquiry'), the applicant was informed, inter alia, that the first respondent has preferred five charges of misconduct ('the five charges') against him and that he was required to attend a domestic inquiry ('DI') to be held on 21 September 2007 to defend himself.

[125] The panel of the DI recommended that the applicant be removed as the Estate Manager of MVE by way of demotion to the next lower position with a reasonable reduction in his pay and benefits after taking into consideration two factors. The first factor is the fact that no disciplinary action had ever been taken against the applicant before this incident. The second factor is the

principle of substantive justice that a punishment meted out to an offender should be commensurate with the gravity of the offence committed by him.

[126] However, although the next lower position is that of a senior estate assistant, the first respondent decided to demote the applicant to the position of an assistant manager, which is two positions lower than the position of an estate manager, and to reduce the applicant's salary from RM6,215 to a sum of RM3,000. This is a reduction of 48.3% of his salary as an estate manager. The first respondent also took away his bungalow and his company car and provided him with a motorcycle for his use in MVE.

[127] As stated earlier in this judgment, this led to the union referring the trade dispute to the DG of the IRD, who failed to resolve the trade dispute and he reported the trade dispute to the Minister, who in turn referred the trade dispute to the Industrial Court for adjudication in the exercise of his power under s 26(2) of the IRA 1967.

[128] At the conclusion of the trial of the IC case by the Industrial Court, Mr Gerald John Pereira of Messrs G Pereira & Assoc prayed for restitution of the reduction in the applicant's salary, which was unlawfully reduced for the period that he remained in MVE as its assistant manager following his demotion on 9 October 2007. He relied on the following reasons in his written submissions dated 27 February 2014:

(a) the first respondent did a great injustice to the applicant by demoting him to the post of assistant manager with a reduction of RM3,000 in salary as the panel of the DI, who admitted that he was paid by the first respondent to undertake that role in the DI, has confirmed during cross-examination in the trial of the IC case, when giving his evidence as the first respondent's fourth witness that he had recommended that the applicant be demoted to the next lower post, vis as senior assistant manager, with a reasonable reduction in his salary and benefits;

(b) since, the first respondent did not produce its disciplinary procedure, it has to be assumed that the first respondent has no such procedure and since the applicant's contract of employment did not have any term or condition for demotion and reduction of salary, the punishment of demotion and reduction of salary was unlawful (see *Kejuruteraan Samudra Timur Sdn Bhd v Seli Mandoh & Anor* [2004] 1 CLJ 393);

(c) the applicant was traumatised by the unlawful punishment of demotion and reduction of salary as he was deprived of his bungalow together with his company vehicle. He was provided with a motorbike, which caused him to live in mortal fear of being attacked by wild animals in MVE during his travels on his motorbike for work purposes. The drastic unauthorised deduction of his salary left the applicant nearly destitute

and it compromised his ability to meet his monthly commitments including the cost of maintenance of his family; and

(d) the five charges preferred against the applicant were frivolous charges because in any estate, the benchmark of a manager's performance is based on the total harvest be it oil palm fruits or rubber; everything else is secondary to the quantity of the harvest; and there is a significant improvement in the tonnage of total harvest during the applicant's tenure as the Manager of MVE.

[129] On the other hand, Mr Teh, the first respondent's learned counsel, submitted that the applicant's claim ought to be dismissed based on the following reasons as contained in his written submissions dated 19 March 2014 for the IC case:

(a) the first respondent has the discretionary power to impose the punishment of demotion and reduction of salary on the applicant as the DI found him guilty of serious misconduct;

(b) however, even though the applicant's serious misconduct warranted his dismissal, the first respondent only imposed on him the lesser punishment of demotion and reduction of salary to give him a second chance;

(c) the Industrial Court has no jurisdiction to vary the punishment imposed on the applicant (see the High Court case of *Harianto Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* [2011] 3 ILR 241; [2011] 5 CLJ 188; [2010] 1 LNS 1236 which followed the minority judgment decision of NH Chan in the Court of Appeal case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 (CA) which was affirmed by the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405; and

(d) the High Court case of *Kejuruteraan Samudra Timur Sdn Bhd v Seli Mandoh & Anor*, referred to by the applicant's learned counsel in his written submissions is distinguishable on facts as the reduction of the workman's salary was done unilaterally by his employer on the ground that the latter had incurred losses in its business.

[130] On issue (3), I was of the respectful view that having found the applicant guilty of the charges of misconduct, the Industrial Court was duty bound to consider the pivotal question arising from the Ministerial reference, which was made under s 26(2) of the IRA 1967, and the parties' pleadings, whether the punishment of demotion and reduction were proportionate to the applicant's misconduct. In considering that pivotal question it would be incumbent on the Industrial Court to consider whether the first respondent

has a contractual or statutory or common law right to impose on the applicant the punishment of demotion and reduction of salary in the first place.

[131] I am of the respectful view that had the Industrial Court considered this point of law, it would have found that the punishment of demotion was not provided for in the applicant's contract of employment or in any other disciplinary procedure of the first respondent, which is applicable to the applicant.

[132] The terms and conditions of the applicant's contract of employment, are contained in his letter of appointment ('letter of appointment') (see exh 'CO1', first respondent's statement in reply filed in the IC case). The letter of appointment states that the applicant will receive a monthly salary of RM5,300 and an increment of RM200 per month upon confirmation in writing of his service by the first respondent after a probationary period of three months making his monthly salary RM5,500, which will be reviewed annually.

[133] The letter of appointment also sets out the applicant's hours of work, bonus, housing allowance and the provision of a motor vehicle for his use as follows:

> HOURS OF WORK
>
> Due to the duties and responsibilities of the office of your position as an executive, you are required to work on the basis of continuos responsibility and be required to work beyond normal office hours or be required, and you will travel on business as often as you may be reasonably required to do so, including on weekends and on Public Holidays without additional compensation.
>
> BONUS
>
> Upon confirmation of service, the Company shall evaluate a yearly bous at the discretion of the Board of Directors.
>
> HOUSING ALLOWANCE
>
> You will be provided with a Housing Allowance of RM 500.00 per month.
>
> MOTOR VEHICLE
>
> You will be provided with a 4 wheel-drive vehicle.

[134] The letter of appointment has a termination clause, which allows termination by either side upon giving the requisite notice to the other side. However, it does not have a clause for demotion and reduction in salary. The clause for termination of service states as follows:

> TERMINATION OF SERVICE
>
> During your probationary period, either party may terminate your service with one

(1) month's notice to the other in writing. Upon confirmation of service, termination of service will require from either party three (3) months' notice in writing or three (3) months' salary in lieu thereof.

[135] I noted that in the trial of the IC case, none of the first respondent's four witnesses, vis Mr Hooi (COW1); En Hamzah) (COW2); En Saifol (COW3); and Mr Chan (COW4) produced any documentary evidence to show that the first respondent had the contractual right to impose the punishment of demotion and reduction in salary on the applicant for his serious misconduct as per the findings of the panel of the DI for the five charges.

[136] Hence, I agreed with Mr Raj's contention that the first respondent had no contractual right to demote the applicant from the position of Estate Manager of MVE to the position of Assistant Estate Manager of MVE and to reduce his salary for his serious misconduct.

[137] I also agreed with Mr Raj's contention that the first respondent could not rely on the statutory power in s 14 of the Employment Act 1955, which provides for the punishment of downgrading of an employee, to fill the lacuna in the applicant's contract of employment. This is because that section applies only to an employee, who is receiving wages of not more than RM2,000 under the first schedule of the Employment Act 1955. However, in the instant case, the applicant's last drawn monthly salary was RM6,215.

[138] I also agreed with Mr Raj's contention based on the cases referred to by him, with which I respectfully agree, that under the common law, an employer has no implied right to demote an employee for misconduct as a form of punishment in the course of taking disciplinary action against him. Hence, on this ground I ruled that the award is unsustainable and must be quashed.

[139] In *Syarikat Permodalan Kebangsaan Bhd v Mohamed Johari Abdul Rahman* [2004] 2 ILR 803, the workman walked out of his job and claimed constructive dismissal after he was demoted on the ground that his employer had no contractual authority to do so. The Industrial Court allowed his claim. In the award, the Industrial Court referred to p 437 of *Smith & Wood's Industrial Law* (7th Ed) Butterworths, where the learned author stated that an employer's prerogative in the disciplining of a delinquent workman is not without fetters, imposed by statute, contract or common law. The learned author stated that if an employer disciplines his workman by imposing a punishment, which the employer has no contractual authority to do so, for eg a demotion, there is the possibility that the wrongly disciplined employee may walk out and claim to have been constructively dismissed, for the purpose of bringing an unfair dismissal action.

[140] In that case, the Industrial Court also referred to *Selwyn's Law of Employment* (7th Ed) Butterworths at para 7.57, entitled 'Demotion' where the learned author also stated that the demotion of a workman, in the absence of an express power contained in his contract of employment or in the statutory rules governing his contract of employment could be a breach of contract by the employer, which could amount to a constructive dismissal.

[141] In that case at p 821, the Industrial Court said as follows:

> Disciplining a delinquent workman is an employer's prerogative though not without fetters, imposed by statute, contract or common law. In this connection *Smith & Wood's Industrial Law* (7th Ed) Butterworths at p 437 reads:
>
> > Although certain forms of disciplinary action may still lie entirely within the managerial prerogative (eg transferring a general labourer to a different job or refusing to give a discretionary bonus), many other forms will impinge upon the rights and expectations of the disciplined employee (eg fines, suspension, demotion) and so the crucial point about lawful disciplinary measures is that the employer must have the power to impose them, and normally this will involve having the contractual authority (express or implied) to do so. If the employer goes outside this authority the employee may in theory maintain a common law action (eg to recover the amount of a fine unlawfully deducted); of much greater significance in modern employment law is the possibility that the wrongly disciplined employee may walk out and claim to have been constructive dismissed, for the purpose of bringing an unfair dismissal action. (Emphasis added.)
>
> *Selwyn's Law of Employment*, 7th Edn, Butterworths, at para 7.57 entitled 'Demotion' reads:
>
> > If there is an express power to do this in the contract or rules, then provided the sanction has been fairly exercised, there should not be any legal problem. In the absence of such a power, it could be a breach of contract by the employer, and hence amount to constructive dismissal. (Emphasis added.)
>
> In the instant case the designation of the claimant which enlightens his job function and his salary puts him outside the scope of the Employment Act 1955 in which event the statutory punishment of downgrading or demotion provided in s 14(1) ibid is not available to the company. The claimant's appointment letter found at pp. 1 and 2 of CLB, in the absence of any other evidence, wills the court to treat as his contract of employment. And this letter makes no mention of the forms of disciplinary action that may be resorted to by the company. In the circumstances the company will have to rely on the common law form of punishment made available as management prerogative. And demotion is not one of them.
>
> That demotion has serious consequences upon a workman cannot be denied. And more serious is a demotion with a reduction in salary as in the instant case. The claimant's salary was reduced by about 28% from RM7,500 to RM5,418.75. There was a drastic change to his earning capacity through his contract of employment upon which his livelihood depended. And to a right of livelihood the claimant is

A entitled to, if not directly by art 5(1) of the Federal Constitution, definitely by way of the authority of Gopal Sri Ram JCA speaking in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Another Appeal* [1997] 1 CLJ 665.

The court therefore holds that the company having no right to exercise demotion as a punishment upon the claimant had not merely breached a term of the claimant's B contract of employment but had essentially offered him a new revised contract of employment which he had a choice to accept or reject.

[142] In *Tan Ngiap Kit v Affin Bank Berhad* [2016] 1 ILJ 160; [2015] 1 ILR 8, the workman walked out of his job after he was demoted and claimed C constructive dismissal on the ground that his employer had no right to demote him. The Industrial Court allowed his claim. In the award, the Industrial Court referred to the bank's guidelines for managing poor performance, which were silent on the type of disciplinary action, which could be imposed on an employee, who was found to be poorly performing, and the general terms and D conditions for executives, which were applicable to the workman but which did not state that the bank could demote an employee and reduce his salary. Hence, the Industrial Court held that since the bank had no express right to demote the workman, the demotion of the workman was a fundamental breach in his contract of employment, which entitled him to claim constructive dismissal. E

[143] In that case, at p 22, the Industrial Court said as follows:

[35] Therefore the Bank has failed to prove that the claimant was not performing. Hence the punishment that was imposed by the Bank cannot stand. Furthermore, F the Bank had no express right to demote the claimant. The Guideline For Managing Poor Performance (pp. 35 to 36 CLB1) is silent in relation to the type of disciplinary action which can be imposed on the employee who is found to be poorly performing. Even the General Terms and Condition for Executive (pp. 28 to 34 CLB1) does not state that the Bank can demote an employee and reduced his salary. Therefore (sic) the Bank's action of demoting and reducing the claimant's salary G clearly showed that it had committed a fundamental breach in the claimant's contract of employment, entitling the claimant to plead Constructive Dismissal.

[144] I respectfully agree with the learned author of KP Chakravarti's H *Domestic Enquiry and Punishment* (3rd Ed) that the effect of a demotion is worse than that of a dismissal because if the workman is dismissed, the workman has the liberty to choose what he wishes to do post dismissal but if he is demoted he will experience frustration from being compelled to work under someone (which will necessarily include taking instructions from someone), I who used to be his junior.

[145] In that book, at p 389, the learned author stated as follows:

In effect, the punishment of reduction in rank is more severe than stoppage of increment. Demotion has a great demoralizing effect. It is worse than even

discharge or dismissal, because on discharge or dismissal a worker is free to choose his own line of action, but on demotion he is to work under somebody who was junior to him which is a frustrating experience.

[146] Reverting back to the instant case, the applicant's feelings of frustration are clearly reflected in his evidence in the trial of the IC case, in the written submissions of his learned counsel, Mr Gerald John Pereira, at the conclusion of the trial and in the written submissions of Mr Raj, learned counsel for the applicant's solicitors, before this court for encl (1). This is because he has switched positions with Encik Hamzah (COW2), the Acting Estate Manager of MVE at the time of the trial of the IC case, who used to be his subordinate officer holding the position of Assistant Estate Manager of MVE.

[147] Since the first respondent has failed to establish before the Industrial Court in the IC case based on the evidence and the law, that it has the contractual or statutory or common law right to impose the punishment of demotion on the applicant, I agreed with Mr Raj's contention that the punishment of demotion constitutes an unfair labour practice.

[148] I respectfully agree with the judgment of the Industrial Court in *Abdul Razak Ismail v Mix-Target (M) Sdn Bhd* [2009] 1 ILR 346, where the Industrial Court held that when there is a double punishment imposed on an employee, it constitutes an unfair labour practice.

[149] In that case, at p 364, the Industrial Court held as follows:

(6) Although the claimant did not plead that the reduction of salary constituted the punishment for his unsatisfactory performance and/or perhaps his misconduct of poor attendance and that the further punishment of dismissal subsequently would constitute a double punishment, this court finds this question to be an issue of fundamental law that a workman cannot be punished twice for the same offence or unsatisfactory performance and/or misconduct of poor attendance. *The act of the respondent in punishing the claimant with reduction in half of this salary and with dismissal constituted double jeopardy on the claimant*. It is certainly the most unfair labour practice against the claimant and is deplorable. In equity, good conscience and the substantial merit of the case, this court finds that terminating the claimant's employment on this ground was not justified. (Emphasis added.)

[150] Hence, I also agreed with Mr Raj's contention that since the applicant in the instant case was subjected to the double punishment of demotion and reduction of salary by the first respondent, it constitutes an unfair labour practice and, consequently, the award is unsustainable and must be brought to this court and quashed vide an order of certiorari.

[151] Hence, I was of the respectful view that had the Industrial Court not made the errors stated above, the Industrial Court would have held in the award that the demotion and reduction of salary imposed as a punishment on the applicant, for his five charges of misconduct, which the first respondent viewed as a lesser punishment when compared to a dismissal, were not only without just cause or excuse but was also an unfair labour practice.

CONCLUSION

[152] In the premises, I allowed the applicant's substantial judicial review application in encl (1) for an order of certiorari to quash the award. Due to the findings of guilt made against the applicant by the Industrial Court on serious charges of misconduct, I was of the view that an order for his reinstatement would be entirely inappropriate. Hence, I issued an order of mandamus for another Chairman of the Industrial Court to determine the amount of compensation to be paid to the applicant resulting from his unlawful demotion and reduction of salary with effect on 9 October 2007.

[153] Before concluding this judgment, I wish to state that I experienced some difficulties in the course of writing this judgment, in particular, in regard to issue (2) due to two reasons.

[154] Firstly, there was no index for the notes of proceedings of the IC case, which were put together with the witness statements as Tab 11 at pp 43–288 of the CCB, encl (28) ('the notes of proceedings'), to indicate the dates of the commencement, continuation and conclusion of the trial of the IC case and the names of the witnesses called, the order of the witnesses called, the dates on which they were called and the page numbers, where their evidence appears to facilitiate my reading of the notes of proceedings.

[155] Secondly, the notes of proceedings were not arranged in sequence by the applicant's solicitors. For example, the trial of the IC case commenced on 31 May 2010 but the first page of the notes of proceedings, vis p 43 of Tab 11 of the CCB, is the notes of proceedings for 18 April 2012 and the notes of proceedings for 31 May 2010 are at pp 90–117. I noted that these pages contain the oral testimony of the first respondent's key witness, Mr Hooi (COW1).

[156] The pages containing the applicant's testimony were also not in sequence. I noted that he had testified on three dates, vis 21 June 2011, 18 April 2012 and 19 April 2012, respectively. However, the notes of his evidence for the first date on 21 June 2011 are at pp 231–288, whilst the notes of his evidence for the second date on 18 April 2012 are at pp 43–62 and the notes of his evidence for the third date on 19 April 2012 are at pp 63–76.

[157] The IC case was first mentioned on 16 October 2008, but the notes of proceedings for 16 October 2008 appear at p 78 of the CCB. The trial was concluded on 19 April 2012 but the notes of proceedings for that date appear at p 76. There were also two missing pages, vis pp 139–140, of the CCB, encl (28).

Order accordingly.

Reported by Ashok Kumar